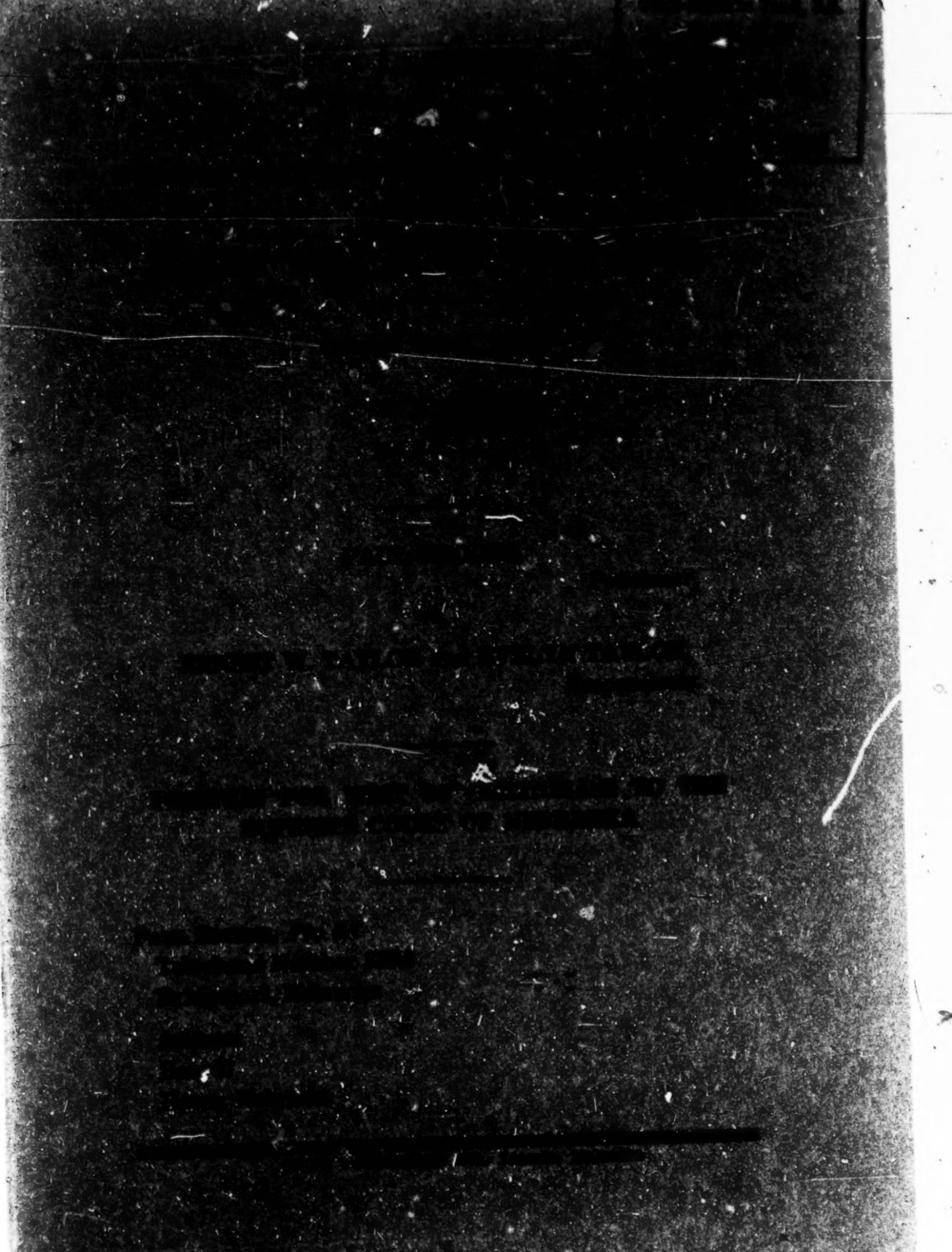

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IN THE

Supreme Court of the United States

October Term, 1963

No. ———

PAUL RHODES,

Petitioner,

vs.

ERNEST W. TAYLOR and EVELYN TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Petitioner, Paul Rhodes prays for a Writ of Certiorari directed to the Supreme Court of the State of Nebraska, to review a judgment of that court entered on the 20th day of December, 1963, and rehearing denied on February 21, 1964.

CITATION TO OPINION BELOW

The opinion appealed from is entitled *Ernest W. Taylor et al., Appellees, v. Paul Rhodes, Appellant,* 176 Neb. 130, 45 S. C. J. 130, 125 N. W. 2d 200.

JURISDICTION

The opinion and judgment sought to be reviewed was dated December 20, 1963, and was entered of record on that date. Rehearing was denied on February 21, 1964 (Appendix B, page 18). Contained in transcript at page 132 (R. 132).

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257 (2) and (3), providing that this Court may, by Writ of Certiorari, review any final judgment for decree rendered by the highest court of a State in which a decision could be had, where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States.

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a denial of due process of law under the Fourteenth Amendment of the United States Constitution for a state District Judge, after he has disqualified himself in the action because of bias, passion, and prejudice against the petitioner and without removal of the disqualification to reassume control of said case. With his personal attorney, the county prosecuting attorney and attorney for respondents, enter judgment in the case at a time when they have the petitioner under illegal commitment to involuntary servitude in the Nebraska State Penitentiary; and to prevent petitioner from securing a review on appeal of said judgment by keeping this petitioner illegally committed to involuntary servitude in violation of his Federal Civil Rights secured by the Thirteenth and Fourteenth Amendments of the United States Constitution. And, then enforce this void judgment by credi-

tors' proceeding, which they had prevented this petitioner from securing a review thereof, by committing him to involuntary servitude in the Nebraska State Penitentiary.

2. Whether a state court as an appellate court which by statute has no jurisdiction of cross complaint, a new cause of action, which was not presented to the trial court below, can render a valid judgment on said new cause of action where the state statute specifically limits the jurisdiction of the appellate court and only vests jurisdiction of the appellate court to the issues that were presented to the court below by the pleading, section 27-1301, R. R. S. Nebraska 1943, Reissue of 1956, and where property is taken from the petitioner on a judgment rendered on a new cause of action in the appellate court, is void and repugnant to the Fourteenth Amendment of the United States Constitution. To enforce said judgment in an independent creditors' suit under color of State authority, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "* * * nor shall any State deprive any person of liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Constitution, Amendment XIII, Section 1:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Sec. 25-544, R. R. S. Nebraska 1943, Reissue of 1956:

"Appeals: Procedure. In civil actions brought under the provisions of Sections 24-501 to 24-553, either party may appeal from the judgment of the county court in the manner as provided by law in cases tried and determined by justices of the peace. The amount of the bond or undertaking taken shall be double the amount of the judgment and costs, and shall be approved by the County Judge."

Sec. 27-1301, R. R. S. Nebraska 1943, Reissue of 1956, provides for:

"APPEAL to District Court from final judgment: rights of parties. In all cases not otherwise specifically provided for, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered. *If either party perfects such appeal it will vest in the district court jurisdiction of all the issues presented to the justice of the peace by the pleadings.* § 27-1301: Laws 1953, c. 75 # p. 240." (Emphasis supplied by writer and that part added by 1953 Legislature.)

STATEMENT

Respondents through their attorney, James L. Macken, and the duly appointed District Judge who had disqualified himself in the action, case 4739 in the District Court of Morrill County, Nebraska, had on November 21, 1960 putatively and in absentia tried this plaintiff for contempt of court and caused illegal commitment to involuntary servitude (HARD LABOR) to the Nebraska State Penitentiary to issue against this petitioner. While said commitment was in the hands of the Sheriff, the District Judge and his personal attorney, the attorney for respondents, and without the removal of the voluntary disqualification of said District Judge in the action, because of bias, passion, and prejudice against this petitioner, in the absence

of this petitioner, entered civil Judgment on December 5, 1960 as appellate Judge in an Appellate Court against this petitioner on a new cause of action that was never presented to the trial court by the pleadings, and by virtue of the Nebraska Statute 27-1301 R. R. S. Nebraska 1943, appellate court had no jurisdiction of the new cause of action on which the judgment was rendered.

Petitioner lodged appeal to Nebraska Supreme Court, which appeal he could not perfect for review because Petitioner was illegally committed to Nebraska State Penitentiary, involuntary servitude, by respondents through their attorney, James L. Macken, acting as State Prosecuting Attorney and attorney for respondents, without the conviction of a crime (R 14 to 31 and R 37 to 47).

That it was determined by the United States District Court for the District of Kansas on April 15, 1964 that this petitioner was illegally committed to involuntary servitude by the said James L. Macken, attorney for respondents, in the case of Paul Rhodes v. Harry W. Edmondson. A copy of the Court's instructions to the jury in the case of Rhodes v. Edmondson in the United States District Court for the District of Kansas with the jury's verdict and judgment of the court is printed in the appendix of this petition at Appendix D page 13.

Respondents started present action through their attorney James L. Macken, a creditors' suit to enforce the void judgment acquired under the circumstances above set forth. Petitioner raised the defenses above set forth by cross petition (R 14 to 31) and by affidavit in resistance to motion for summary judgment (R 37 to 43). That notwithstanding the facts and the disputed facts the trial court granted summary judgment against this petitioner

which was sustained by the Nebraska Supreme Court and motion for rehearing was denied. The Court's attention is directed to this petitioner's briefs in the Nebraska Supreme Court (R 58, 60) and petitioner's brief and motion for rehearing (R 67).

REASONS FOR GRANTING THE WRIT

1. The opinion of the Nebraska court permits respondents to use the state Prosecuting Attorney as their private attorney in civil litigation and imprison petitioner and commit him to involuntary servitude without the conviction of a crime in violation of the Thirteenth and Fourteenth Amendments of the United States Constitution while they tried the law suit against the petitioner, dispose of the case, without due process of law, and then in a creditors' suit take petitioner's property under color of state authority on said void judgment without due process of law repugnant to the Thirteenth and Fourteenth amendments of the United States Constitution: That the State Court has therefore in substance determined a federal question that has not been determined by this court.

That the Supreme Court of the state of Nebraska has determined the question that the void judgment is not subject to collateral attack in a creditors' proceeding contrary to the decisions of this court, *Fay v. Nola*, 83 S. Ct. 822 (1963). The decision of the Nebraska Supreme Court is also contrary to *Sacher v. United States*, 72 S. Ct. 451 at page 460 that no man should be forced to try before a judge who had previously publicly attacked his personal honor and integrity. The risk to impartial trial is far to great.

2. The ruling of the Nebraska Supreme Court that the Judgment was valid and that the Court had jurisdiction to

render the same is contrary to its own rule of law in the case, Syllabus 2 in its opinion (Appendix P. 11):

> "Case must be tried in District court on appeal upon the issues presented in the lower court."

That the taking of this petitioner's property under such ruling violates the due process of law clause of the Fourteenth Amendment of the United States Constitution, and opinion of the court, Appendix A, this brief. It was long the rule of law in Nebraska that an appellate court is limited to the issues that were presented in the lower court. *Darner v. Daggeti*, 35 Neb. 895:

> "Appeal from County Court: Issues in Appellate Court. It is the settled law of this state that, when an appeal is taken from the County Court to the district court, the cause is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the trial."
>
> "It is obvious that the court did not err in striking out of answer the allegations therein relating to the representations of the plaintiff as to the value of the farm and the incumbrances thereon, *for the reason that no such issue was presented in the County Court.* As already stated, the answer in that court was simply a general denial. *Defendant should have set up in his first answer his counterclaim for damages; Not having done so, he could not present it for the first time in the district court on the trial of his appeal.* It is firmly settled in this state that a cause is to be tried in the district court upon appeal upon the same issues as in the court from which the appeal was taken, with the exception of new matter arising after the first trial.. (O'Leary v. Iskey, 12 Neb. 136; Vaier v. Humpall, 16 Id. 127; U. P. R. Co. v. Ogilvy, 18 Id., 636; Fuller v. Schroeder, 20 Id., 631; Lamb v. Thompson, 31 Id., 448; Bishop v. Stevens, Id., 786.)" (Emphasis supplied by writer.)

Bishop v. Stevens, 31 Neb. 786:

"In O'Leary v. Iskey, 12 Neb. 136, it was held that when an appeal was taken from the County Court to the district court the case was to be tried in the appellate court upon the issues that were presented in the court from which the appeal was taken, with the exception that matter arising after the trial, such as payment, compromise, release, etc., may be pleaded as a defense to the action. It is said (p. 137): *'A set-off arising before the commencement of the action, to be available in the appellate court, must have been presented to the court below for its adjudication.* The reason is, an appeal, when a bond is given as in this case, has the effect to vacate the judgment of the court below, and presents the same issues to the appellate court for its determination as was presented in the court below. *If new issues can be raised in the appellate court it is not a trial of the same cause, not in fact an appeal.* An appeal brings up the case presented in the court below for a new trial, and the issues cannot be changed in the appellate court * * *. Cases are tried on their merits; then if either party is dissatisfied with the judgment they may appeal.' * * *."

"This is a reasonable rule. The design is to encourage trials of cases upon the merits. If a party can withhold his defense in the inferior court, allow judgment to be rendered against him and make his defense for the first time in the appellate court, the latter courts will be burdened with business, while great injustice will be done to litigants who had brought their actions before the inferior tribunals. A trial in a county court or before a justice of the peace probably will result in a correct judgment being rendered; and that this is true in an eminent degree, is shown by the comparatively small number of appeals taken from such judgments. *In any event a party must present his defense and if the judgment is not satisfactory to him he may appeal the case submitted to the inferior tribunal to the district court, where he will be confined to the same issues as were*

presented in the inferior Court." (Emphasis supplied by writer.)

That the legislature made it absolutely statutory and jurisdictional that the appellate court, District Court, only had jurisdiction of the causes of action that were presented to the lower court by the pleadings. This was done by the 1953 Legislature of the State of Nebraska by amending section 27-1301, R. R. S. Nebraska 1943 Reissue of 1956 by adding the part to the statute that is in italics, emphasis supplied by this writer, and reads as follows, to-wit:

> "APPEAL to District Court from final judgment; rights of parties. In all cases not otherwise specifically provided for, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered. *If either party perfects such appeal it will vest in the district court jurisdiction of all the issues presented to the justice of the peace by the pleadings.* § 27-1301: Laws 1953, c. 75 # p. 240."

3. That the judgment upon which the creditors' suit was based being rendered by a judge, after his voluntary disqualification in the case because of bias, passion and prejudice against this petitioner the judgment is repugnant to the due process of law of the Fourteenth Amendment of the United States Constitution and the controlling cases, to-wit:

Stringer v. U. S., 233 F. 2d 947, 16 Alaska 305:

> "Where district judge disqualified himself for cause on his own motion, it was incurable error for him later to resume full control and try the case, * * *."

Sacher v. United States, 72 S. Ct. 451 at page 460:

> "No man should be forced to trial before a judge who has previously publicly attacked his personal honor

and integrity. The risk to impartial trial is too great."

CONCLUSION

That the Supreme Court of Nebraska violated this petitioner's Federal Constitutional Rights in taking this petitioner's property and enforcing the void judgment, rendered by a disqualified judge, and denying this petitioner appellate procedure by committing him to involuntary servitude and that opinion and judgment should be reversed and remanded to the Supreme Court of Nebraska with instructions to vacate its opinion and judgment, and directions to remand the same to the district court to reverse its decision and dismiss the action.

For the foregoing reasons the petition for Certiorari should be granted and the same issued to the Supreme Court of the State of Nebraska.

Respectfully submitted,

PAUL RHODES,
Appearing *Pro Se*

Box 47
Howe, Nebraska

APPENDIX A

OPINION OF THE NEBRASKA SUPREME COURT
NO. 35511

ERNEST W. TAYLOR ET AL., APPELLEES, v. PAUL RHODES, APPELLANT, IMPLEADED WITH AUGUSTINE J. RHODES ET AL., APPELLEES.
— N. W. 2d —

Filed December 20, 1963. No. 35511.

1. APPEAL AND ERROR: PLEADING. In the case of an appeal to the district court from the county court, the rules of pleading are the same as in an action in a justice of the peace court.
2. APPEAL AND ERROR. As a general rule a case must be tried in the district court on appeal upon the issues presented in the lower court.

Appeal from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

Paul Rhodes, pro se.

James L. Macken, for appellees Taylor.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Ernest W. Taylor and Evelyn Taylor, plaintiffs and appellees, against Paul Rhodes, Augustine J. Rhodes, Mutual Life Insurance Company of New York, and The Federal Land Bank, defendants. The defendant, Paul Rhodes, is the only appellant in the action here on appeal. By the pleadings no claim is made for affirmative relief against Mutual Life Insurance Company of New York or The Federal Land Bank and none awarded either for or against them, hence no further reference will

be made to them except to say that they were holders of liens on real estate which is a subject controversy in this action. The defendant Augustine J. Rhodes is the wife of the defendant, Paul Rhodes, and although interests of hers are involved, she is not a party to this appeal.

The action here is one in equity instituted by the plaintiffs who are appellees here to set aside two separate transfers of title to real estate made by the appellant to the defendant, Augustine J. Rhodes, his wife. The purpose of the action was to have these transfers set aside so as to permit action to have the interest of the appellant subjected to the payment of a money judgment obtained in another action by the appallees here against the appellant together with interest on that judgment and the costs.

The judgment in the action here was in favor of the appellees and against the appellant and Augustine J. Rhodes. By the judgment in the case, the deeds were not set aside. They were not set aside by reason of the fact that the appellant voluntarily deposited with the clerk of the district court a sufficient amount of money with which to satisfy the money judgment with interest and costs in the other action. By the terms of the deposit, it was made a trust, to abide the ultimate decision as to the validity of the judgment which the appellees had obtained against the appellant in the action here.

Following a hearing, a motion for summary judgment made by the appellant was overruled and a motion for summary judgment in favor of appellees was sustained. By the judgment which was rendered a cross-petition which had been filed by appellant was dismissed; the fund which had been deposited by the appellant was ordered applied to the payment of the judgment, interest, and

costs in the other action; the issue of invalidity of the conveyances made by the appellant to Augustine J. Rhodes was dismissed; and it was provided that if the deposit made by appellant was insufficient to pay the judgment, interest, and costs in the other action, the appellees were declared to have the right to take further proceedings to recover the difference in that action.

Thereafter, the appellant filed a motion for new trial which motion was overruled. From the judgment and the order overruling the motion for new trial the appellant has taken this appeal.

The brief of appellant contains seven separate assignments of error which he contends are grounds for reversal, but there is a supplemental transcript which must be regarded as controlling and in it is contained an adjudication which fixes the issues triable in the district court and of course which defines the issues which are here for consideration and determination. This renders these assignments of error inapplicable.

The decision herein however requires a review of the procedures involved in actions by the appellant against the appellees and of appellees against the appellant and in particular an action which was commenced by appellant in the county court.

In that action, the appellant here, as plaintiff there, filed an action in the county court of Morrill County, Nebraska, against the plaintiffs and appellees here who were defendants there, for the recovery of judgment for $532.15. The record here shows service of summons on the appellees. In response the appellees filed a special appearance in which they asserted that the service of process was not

sufficient. In it they asked for no relief. The action was filed December 29, 1958, and the service of process was made the same day. The special appearance was filed February 2, 1959. On June 22, 1959, the appellant moved for judgment because of default in which he asserted that the appellees had entered a general appearance and had failed to answer within the time required by law. On that date the motion for default was sustained and judgment was rendered in favor of appellant and against the appellees for $532.15 with interest.

On June 25, 1959, and within the same term, the appellees filed a motion to set aside. Grounds asserted in the motion were that the special appearance was filed before answer day; that they had entered no general appearance; that the attorney for appellees was under the impression that no action would be taken on the matter of judgment until the question of whether or not the appellees had entered a general appearance had been decided which had been taken under advisement; and that the appellees had a defense and counter-claim to and against the claim of appellant for all of which reasons they asked leave to plead to the petition and to file their counter-claim.

On June 27, 1959, the county court overruled the motion to set aside the default and judgment and the included motion for leave to plead.

From this judgment and order, the appellees took an appeal to the district court. On that appeal to the district court, the default and judgment were vacated and set aside and the appellees were given permission to answer in the district court the petition of appellant filed in the county court and also to file a cross-petition. The case was presented for trial to the district court on the issues

presented by these pleadings. The adjudication which has been described as having been made by the appeal here was the result.

The journal entry describing and awarding judgment herein in favor of appellees recites that a hearing was had on a motion for summary judgment in favor of appellant; and that evidence was taken on a motion by the appellees for summary judgment and the parties rested.

Of this hearing there is a bill of exceptions. It contains no record of testimony of witnesses taken, but contains a large number of exhibits none of which is identified as supporting any practical phase or issue of the litigation in the case here. It should be said however that the authenticity of none of the exhibits is brought into question. It is the bill of exceptions of the appellant.

In any event, the bill of exceptions is of little, if any, moment in the light of what in analysis is involved and what was considered. Involved in actuality for the most part is a question of whether or not in the event a county court enters a default and renders judgment pursuant thereto and the default and judgment are vacated on appeal by the district court, may the district court, over objection, try the case from which the appeal was taken on issues not presented to the county court. The reason for this is that the appellant contends that new issues were presented to the district court by cross-petition.

The appellant contends that in such an event it is the duty of the district court to return the case to the county court for the trial of the new issues.

The district court did retain the case, permitted defensive

pleadings and a counterclaim, and rendered judgment in favor of the appellees, which action the appellant insists was without jurisdiction and rendered the judgment void and subject to collateral attack.

In the case of an appeal to the district court from the county court, the rules of pleading are the same as in an action in a justice of the peace court. Strine v. S. Kingsbaker & Brother, 12 Neb. 52, 10 N. W. 534; Clarine v. Nelson, 15 Neb. 440, 19 N. W. 684.

It is the rule that a case must be tried in the district court upon the issues presented in the lower court. First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. 276; Lee v. Walker, 35 Neb. 689, 53 N. W. 597; Jacob North & Co. v. Angelo, on rehearing, 75 Neb. 381, 110 N. W. 570; Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150.

This cross-action was not amendatory of anything which had been pleaded by the appellant against the appellees in his action in the county court, and neither was it germaine to any defense available to the appellees in this action on the basis of pleadings. This is made conclusively clear by the pleadings, affidavits, and exhibits which were before the district court which are now before this court.

The entire pertinent substance was that of whether or not the appellees who had recovered a money judgment against the appellant had a valid judgment, and were entitled to have it satisfied out of the money which had been deposited conditionally by the appellant to satisfy it in case the appellees should prevail in this their action to set aside the deeds of the appellant to his wife.

By the judgment, the court determined that they had

such a valid judgment. There is no evidence in the bill of exceptions on this subject, therefore the adjudication must be accepted as final. It was ordered that the money which had been deposited should be applied to the payment of the judgment to which attention has been called in accordance with the previous order of the court made pursuant to agreement of the appellant. There was nothing more which related to issues actually involved.

In the light of this, the question of whether or not the cross-action was proper does not require consideration further herein. The cross-action and that part of the record relating thereto had no relation in the light of the record presented, to any pertinent matter presented by the record. While it may well be said academically that the appellees were insistent upon something to which they were not entitled, it was not harmful to the appellant and that the relief granted to appellees was proper.

This is true since the record discloses by judicial determination and declaration as has already been indicated, that the appellant agreed on September 25, 1961, that "only issues relating to validity of the judgment herein in Case No. 4739 in the District Court for Morrill County, Nebraska, and that the fund which he has heretofore deposited in court may be used to satisfy judgment in the event said issues are adjudicated adverse to defendant Paul Rhodes in these proceedings," were presented for determination.

The issue involved in case No. 4739 was finally adjudicated in favor of appellees. All in actuality that the court did by its judgment was to vacate the default, as it had a right to do, in the exercise of its discretion: adjudicate in accordance the declared tender of defensive issues made by

the appellant; and implement the appellant's agreement to satisfy the judgment mentioned.

The judgment is correct and it is therefore affirmed.

AFFIRMED.

APPENDIX B

MOTION FOR REHEARING DENIED FEBRUARY 21, 1964.

APPENDIX C

ORDER SUSPENDING ISSUANCE OF MANDATE PENDING APPLICATION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

"This cause coming on to be heard upon application of appellant for stay of mandate was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said application be, and hereby is, sustained and issuance of mandate is withheld until May 21, 1964."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

PAUL E. RHODES,
Plaintiff

vs. No. T-3405

HARRY W. EDMONDSON,
Defendant.

THE COURT'S INSTRUCTIONS

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, the time has come to instruct you as to the law governing the case.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

If, in these instructions, any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions, and as a whole, and you are to regard each instruction in the light of all the others.

You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

This action was commenced by the filing of a complaint by the plaintiff, Paul E. Rhodes in the United States District Court for the District of Kansas on September 24, 1963 against the defendant Harry W. Edmondson.

It is alleged in the complaint that:

1.

Plaintiff is a citizen of the United States and a citizen and resident of the state of Nebraska.

2.

That the defendant is a citizen of the United States and a citizen and resident of the state of Kansas, and a citizen of the United States of America, and was from the period of January 23, 1961 to and including August 21, 1961, a guard at the Nebraska State Penitentiary, and was at all times hereinafter mentioned and at all times pertinent hereto acting within the scope of and under the color of that office as an employee and officer of the State of Nebraska in his official capacity, and acting under color of statute, ordinance, regulation, customs, and usage of the State of Nebraska and under the Direction of Maurice H. Sigler, warden of the Nebraska Penitentiary, and Clarence A. H. Meyer, Attorney General of the State of Nebraska.

3.

On or about November 21, 1960 the plaintiff over his protest on file in writing was tried *in absentia* in the District Court of Morrill County, Nebraska, for contempt of court before Richard M. Van Steenberg, District Judge. The plaintiff was not present in person nor was he represented by Counsel. Notwithstanding his absence and the lack of representation by counsel the plaintiff was putatively, in absentia, tried for the offense of "Contempt of Court" sentenced to nine (9) months hard labor in the Nebraska State Penitentiary and was subjected to the imposition of a $2,500.00 fine and costs of the action.

At the Conclusion of said hearing TRIAL IN ABSENTIA

the trial court entered the following order in part to-wit:

> 'Now on this 21st day of November, 1960, one of the regular days of the September, 1960 term of this court this matter came on to be heard * * *. The State was represented by the County Attorney, James L. Macken. The defendant was not present and was not represented by counsel. * * * The matter came on further to be heard on its merits. The state introduced additional evidence * * *. The court being fully advised upon the premises finds the defendant guilty of Contempt as charged, and that he should be sentenced to confinement in the Nebraska State Penitentiary for a period of nine months at hard labor, Sundays and Holidays excluded, and to pay a fine of $2,500.00 and the costs of this proceeding.
>
> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of nine (9) months at Hard Labor, Sundays and Holidays excepted, and to pay a fine in the amount of Two Thousand Five Hundred dollars ($2,500.00) and the costs of this Proceeding. By the Court: /s/ R. M. Van Steenberg, District Judge."

That this plaintiff was served with no Notice of said hearing, and that a false affidavit that he had been was filed or caused to be filed in the files of said case by James L. Macken, County Attorney of Morrill County, Nebraska, with intent to deceive the Court and the party to this action, this plaintiff.

That prior thereto in the same action in Absentia, in the absence of this plaintiff, and without notice to this plaintiff of any kind, a hearing was held on September 28th, 1961 in which the County Attorney, James L. Macken

and R. M. Van Steenberg, the District Judge, and R. B. Nichols, the Court Reporter were present and material evidence was introduced and a witness *badgered* into testifying the way they wanted him to, in order to secure release by a said witness from prison, and after so testifying was released from prison, by said James L. Macken, the County Attorney, all in violation of Due Process of Law and Equal Protection of Law Clauses of the 14th Amendment of the United States Constitution, and in violation of the Statutes of the State of Nebraska and the Nebraska Constitution, and all done with intention to deny this plaintiff his Federal Civil Rights and Federal Constitutional Rights.

That on November 21, 1960 this plaintiff was not under bond or recognizance to appear before the District Court of Morrill County, Nebraska, in said Case 4819 Contempt proceeding above referred to and was not in body on November 21, 1960 within the Territorial Jurisdiction of said Court, and therefore the Court had no jurisdiction over the body of this plaintiff on November 21, 1960.

On or about November 2, 1960 the Clerk of the District Court of Morrill County, Nebraska, acting under the color of her office and authority as such in the complete absence of any mittimus or other direction by the District Court issued an "Order of Commitment" in words and figures as follows:

> "State of Nebraska, Morrill County ss. To the Sheriff of said County: WHEREAS, At a regular term of the District Court for said County which term was begun and held at the Court House, in Bridgeport, in said County, on the 16th day of April, 1960; Present, the Hon. R. M. Van Steenberg, one of the judges of said Court:

AND, WHEREAS, Clarence S. Beck, Attorney General for the State of Nebraska, on the 20th day of July, 1960, came into Court, and presented a certain information in due form of law, against Paul E. Rhodes for Contempt of Court which information was by order of the Court filed and the cause docketed, and afterwards on the 6th and 7th days of September and the 21st day of November, 1960, further proceedings were had upon said information. To-wit: ON TRIAL TO THE COURT the said Paul E. Rhodes was put upon his trial and said Court entered a Judgment of 'Guilty of Contempt as charged'. And, Whereas, on the 21st day of November, the said Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.'

You are therefore commanded to proceed to execute the said sentence and order of this court.

WITNESS my hand and seal of said Court at Bridgeport, Nebraska, this 23rd day of November, 1960. /s/ Virginia A. Schuetz, Clerk of the District Court."

4.

Thereafter on January 16th, 1961 under color the "Order of Commitment" referred to in Paragraph 3 above and at the specific direction of the County Attorney of Morrill County, Nebraska, one W. W. Schulz, the then Sheriff of Cheyenne County, Nebraska, without a warrant, placed this plaintiff under arrest and then and there imprisoned him in the County Jail in Cheyenne County, Nebraska.

5.

On January 16th, 1961, the plaintiff applied to the District Court of Cheyenne County, Nebraska, the Honorable

John H. Kuns, District Judge, by written petition for a Writ of Habeas Corpus, on the grounds that the District Court of Morrill County had no jurisdiction, power or authority, (a) to try the case in the absence of the defendant, (b) to enter judgment and pass sentence in the absence of the defendant, (c) to pronounce sentence of imprisonment in the Nebraska State Penitentiary for nine (9) months, at hard labor, and fine of $2,500.00 and costs for the offense of contempt of court, or (d) to sentence to hard labor for such offense, and (e) that contempt of Court is not a crime in Nebraska, and the petition further alleged that the District Court of Morrill County had no jurisdiction because it had been divested of jurisdiction by a previous habeas corpus action which released plaintiff and discharged him from such custody and charge of contempt, and that the District Judge trying the case was disqualified to sit on the matter, and that the arrest w by virtue of a Warrant of Commitment which petitioner had not seen, that the District Judge, John H. Kuns on reading the Petition on January 16, 1961 entered the following order, to-wit:

> "On reading the petition of Paul E. Rhodes duly verified whereby it appears that he is illegally imprisoned and restrained of his liberty by W. W. Schulz, Sheriff of Cheyenne County, Nebraska, and stating wherein the illegality consists from which it appears that he is entitled to a writ of habeas corpus and that the same shall issue; produce to me a copy of the order of conviction and commitment and cause of his detention by which said Paul E. Rhodes is deprived of his liberty, and it appearing to me that the said Paul E. Rhodes is unlawfully detained, it is therefore ordered that a writ of habeas corpus be allowed to issue in favor of Paul E. Rhodes returnable forthwith and directed to W. W. Schulz, sheriff and Ker-

mit Braumbaugh, deputy sheriff. BY THE COURT /s/ John H. Kuns, District Judge."

Said writ of habeas corpus was duly issued and return thereof was made by W. W. Schulz, Sheriff of Cheyenne County, Nebraska. That said Cheyenne County Sheriff made the return in part as follows:

> That the authority and true and whole cause of such imprisonment is by reason of the direction of the County Attorney of Morrill County, Nebraska, James L. Macken and the Sheriff of Morrill County, Nebraska, Norval Houston, pursuant to an order Judgment and Journal Entry of the District Court of Morrill County, Nebraska of November 21, 1960, a copy of which is hereto attached and herein made a part of this return the same as if copied in full herein. That a copy of said warrant of commitment is hereto attached and herein made a part of this return the same as if copied in full herein. That a copy of said warrant of commitment is hereto attached and herein made a part of this return the same as if copied in full herein. In obedience to the writ of habeas corpus issued herein he now produces the body of the said Paul E. Rhodes before John H. Kuns, District Judge of Cheyenne County, Nebraska, and the District Court of Cheyenne County, Nebraska, to be dealt with according to law."

The two exhibits were delivered to the court, John H. Kuns, Judge, with said return and with this plaintiff's body, and all done on January 16, 1961.

Thereafter, on January 16th, 1961, the District Court of Cheyenne County, Nebraska in said Habeas Corpus proceeding being Case No. 6617 entered in part the following order, to-wit:

> "And thereafter, on the same day, the Court having carefully examined the petition and the return to the

writ of Habeas Corpus and it appearing to the court that the order of the District Court of Morrill County, Nebraska set out in the petition and referred to in the return is not a warrant or commitment, on the court's own motion it is ordered that the relator be discharged on the sole ground that his arrest by respondents was not by virtue of any warrant or order of commitment. It is further ordered that the court's earlier order fixing bail be and is hereby vacated."

The plaintiff was forthwith discharged from custody and set at large and no error proceeding, appeal, or other review was sought of said order setting this plaintiff at large and the same was a final judgment.

6.

On January 23, 1961 this plaintiff in the courthouse building at Sidney, Nebraska, being the Courthouse building for Cheyenne County, Nebraska the plaintiff while in attendance at court, was placed under physical arrest by Norval Houston, Sheriff of Morrill County, Nebraska, James L. Macken, County Attorney of Morrill County, Nebraska and others, and under the direction of said James L. Macken, and such action taken under the color of the commitment heretofore referred to and at gun point forceably handcuffed.

No warrant or valid commitment had ever been issued for the arrest or detention of this plaintiff and no order of the court in the District Court of Morrill County, Nebraska, had been entered since November 21, 1960 and said parties took such action in disobedience of the order of the District Court of Cheyenne County, Nebraska referred to in the above paragraphs. That the action was done with the intent to deny this plaintiff, Paul E. Rhodes equal protection of the law and to deny him due process

of law all in violation of the XIV Amendment of the Constitution of the United States and that the same had been planned by said parties heretofore named under the circumstances as herein alleged and in agreement with Clarence A. H. Meyer, Attorney General of the state of Nebraska, and Maurice Sigler, Warden of the Nebraska State Penitentiary. That this plaintiff on January 23, 1961 demanded the assistance of legal counsel and such demand was refused.

7.

That plaintiff was forceably removed from Cheyenne County, Nebraska to Lincoln, Lancaster County, on said date of January 23, 1961, held incommunicado some 400 miles away and committed to the Nebraska State Penitentiary as Convict No. 21675 to serve said sentence at hard labor.

8.

On January 23, 1961 at the time of plaintiff's apprehension, arrest, and incarceration, there was no valid judgment or sentence pronounced against the plaintiff the purported judgment and sentence having been adjudged in the absence of the plaintiff. At the time of his apprehension, arrest and incarceration the plaintiff was purportedly charged with a criminal offense while the fact is that the contempt for which the plaintiff was purportedly tried was in fact a civil proceeding in that by reason of the statutes then and there in force in the State of Nebraska the Court that pronounced such judgment was without jurisdiction or authority to do so. That the Court of Morrill County was without jurisdiction to pronounce judgment and sentence to the penitentiary of Nebraska at hard labor under such statutes last above referred to, and the offense of Contempt of Court not being a crime under Nebraska Statutes, said

purported judgment constituted Involuntary Servitude and was repugnant to the XIII and XIV Amendments of the United States Constitution.

9.

That in said case No. 4819 of the District Court of Morrill County, Nebraska heretofore referred to, proceedings were had therein on September 28, 1960 without any notice whatever to this plaintiff and he was not present in body or by counsel, and a material witness was called and examined in said case, about material matters in said case with only the Judge, prosecuting attorney and the Court Reporter present, said witness being promised freedom from jail and restored to his liberty if he would testify as directed by the prosecuting attorney and he so testified and was restored to his liberty constituting unconstitutional duress and denial of due process of law in violation of the XIV Amendment of the United States Constitution.

10.

That the defendant herein, Harry W. Edmondson knowingly after the discharge and setting at large of this plaintiff on January 16, 1960, in Habeas Corpus by the District Court of Cheyenne County, Nebraska, knowingly aided and assisted in the recommitment and imprisonment of this plaintiff, Paul E. Rhodes on January 23, 1961 to and including August 21, 1961 in the Nebraska State Penitentiary at Lincoln, Nebraska, at the specific direction of Maurice Sigler, Warden of the Nebraska State Penitentiary and Clarence A. H. Meyer, Attorney General of the State of Nebraska, and did so knowing that the District Court of Morrill County, Nebraska had entered no further order after the Discharge in Habeas Corpus of January 16, 1961, by the Cheyenne County, Nebraska District Court.

11.

That the actions of the defendant Harry W. Edmondson, above described constituted a deprivation of this plaintiff's Federal Civil Rights and constitutional rights repugnant to the provisions of the United States constitution set out in the jurisdictional statement of this complaint, and a denial of the due process of law and equal protection of law to this plaintiff in violation of the 14th Amendment of the United States Constitution and a denial of equal protection of the law to this plaintiff pursuant to Section 29-2809 R. R. S. Nebraska 1943 which forbids recommitment or imprisonment after discharge in Habeas Corpus and reads as follows, to-wit:

> "Applicant discharged; rearrest for same offense prohibited; penalty; exceptions. Any person who shall be set at large upon any habeas corpus shall not again be imprisoned for the same offense, unless by legal order or process of the court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause or offense. If any person shall knowingly, contrary to Sections 29-2801 to 29-2824, recommit or imprison, or cause to be recommitted or imprisoned for the same offense or pretended offense, he shall forfeit to the party aggrieved five hundred dollars, any colorable pretense or variation in the warrant or commitment notwithstanding."

12.

That during the shift of the defendant, during the period of January 23, 1961 to May 12, 1961, on certain days the defendant denied the plaintiff use of Sanitary Facilities, and toilets which caused this plaintiff great mental and physical pain, and greatly injured the health of this plaintiff and caused this plaintiff to suffer great physical pain and anguish, and at times excruciating physical pain and this during the unlawful imprisonment of this plaintiff by

the defendant in violation of Article I, Section 9 of the United States Constitution, suspending the Writ of Habeas Corpus and the XIV Amendment of the United States Constitution.

As a direct and proximate result of the aforesaid acts of the defendant this plaintiff has suffered great bodily pain, injury and mental anguish from then until now and will continue to so suffer in the future; and he has lost and will in the future lose large sums of money by reason of having been humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendant.

Wherefore, plaintiff demands judgment against the defendant in the amount of five hundred dollars ($500.00) liquidated actual damages suffered as prescribed by Section 29-2809, R. R. S. Nebraska 1943, Reissue of 1956 plus the costs of the action and he further demands punitive damages against the defendant in the amount of One Hundred Million Dollars ($100,000,000.00) plus the costs of this action and further demands judgment for actual damage to his business, professional standing, and to his investment income and for physical pain, suffering and anguish and actual damages to the plaintiff's health in the sum of One Hundred Million Dollars ($100,000,000.00) and further demands such other and further relief as to this court seems just and equitable.

INSTRUCTION NO. 3

You are instructed that Section 1983 of Title 42, United States Code provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

You are further instructed that Federal District Courts have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

You are further instructed the action here is a proper proceeding for redress.

INSTRUCTION NO. 4

In view of the fact that plaintiff herein has been granted a default judgment, the allegations of the complaint must be considered by you as a conclusive adjudication that the plaintiff's civil rights herein have been violated and that the defendant herein has deprived this plaintiff of certain civil rights in the manner set forth and described in plaintiff's complaint.

Under such circumstances as I have instructed you previously, the only matter for you to determine will be the amount of damages which the plaintiff has sustained, since the claims of the plaintiff are not denied by the defendant.

INSTRUCTION NO. 4a

It is alleged, and you must consider that the defendant,

Harry W. Edmondson, was a part of a conspiracy, which conspiracy deprived this plaintiff of certain civil rights as set out in the complaint. Under these circumstances, any acts by Edmondson are, what is called under the law, overt acts in furtherance of the conspiracy.

Therefore, in considering damages sustained by this plaintiff, you are entitled to consider all damages which, under the evidence, p.oximately resulted from the plaintiff being deprived of his civil rights.

INSTRUCTION NO. 5

You are hereby instructed that the defendant Edmondson knowingly aided, abetted and assisted in the reimprisonment and recommitment of the plaintiff in this action to involuntary servitude after his discharge in habeas corpus of the District Court of Cheyenne County, Nebraska and this recommitment violated 29-2809, R. R. S. Nebraska 1943 which provides for $500.00 liquidated damages for the recommitment. Accordingly you shall award the plaintiff a judgment of $500.00.

INSTRUCTION NO. 6

You will allow, by your verdict, such actual damages as will, in your judgment, under the evidence, fairly and adequately compensate the plaintiff herein for the injury and damage sustained as a direct and natural consequence of being deprived of his civil rights by the defendant herein, and in arriving at the amount of plaintiff's actual damages, if any, you may not allow him more than $100,000,000, the amount prayed for in the complaint.

INSTRUCTION NO. 7

In assessing the amount of actual damage the plaintiff

has actually suffered as a result of being deprived of his civil rights by this defendant you may consider loss to the plaintiff's business; loss in professional standing; loss in investment income; loss as a result of being held in public scorn; loss from being imprisoned in the Nebraska State Penitentiary as Convict No. 21675; loss from mental and physical anguish; loss to his health; loss from suffering and embarrassment; loss for degradation in standing in the community, and any other loss to this plaintiff, such as his vehicle operator's license, which proximately resulted from this plaintiff being deprived of his civil rights.

INSTRUCTION NO. 8

After you have determined, under these instructions, the amount of actual damages, if any, that plaintiff has proximately sustained from being deprived of his civil rights by this defendant, you will then determine the amount that plaintiff is entitled to recover as punitive damages.

Punitive or exemplary damages is commonly called smart-money. If the conduct of a defendant is such as to amount to a wanton and reckless disregard of the rights of the plaintiff in the enjoyment of his rights as a citizen, and discloses such gross neglect of duty to a defendant as to evince a reckless indifference to the rights of that defendant, then a plaintiff is entitled to punitive damages. In this case punitive damages should be assessed and in assessing such damages you may take into consideration the following items:

(1) The expense in preparation for trial by plaintiff; and

(2) An amount as shall be an example to others to deter them from such conduct.

The amount should not be so small as to be trifling nor

so large as to be unjust, but such as candid and dispassionate minds can approve as a punitive example and as a warning to others against a similar lapse of duty.

If you should award such damages you are instructed that you may not award more than $100,000,000 to the plaintiff.

INSTRUCTION NO. 9

In summarizing, the damages are separated into three categories:

1. $500.00 Nebraska Statutory damages for recommitment after discharge from habeas corpus;
2. Actual damages plaintiff has suffered; and
3. Punitive damages.

INSTRUCTION NO. 10

During the trial of this case certain testimony has been read to you by way of deposition. The testimony of a witness who for some reason cannot be present to testify from the witness stand is usually presented in writing under oath in the form of a deposition. Such testimony is entitled to the same consideration and, in so far as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

INSTRUCTION NO. 11

There are certain other general principles governing the manner in which you should approach your duties in this case which I should like to mention to you at this time.

I should like to instruct you that you are the sole judges of the credibility of the witnesses and of the testimony

that you have heard. In determining the credibility of witnesses, you have a right to take into consideration the demeanor of such witness or witnesses on the stand, his candor and sincerity in testifying; or the lack of the same; his interest or lack of interest in the outcome of the suit; his knowledge or lack of knowledge concerning the facts about which he testifies; his prejudices or biases, if any are shown, his relationship, if any, to either party to the suit, and such other facts and circumstances, as disclosed by the evidence, as will assist you in determining the weight you should give to the evidence in the case.

If you find that any witness knowingly testified falsely to any material fact in issue in this case, I instruct you that you may disregard all of the evidence of such witness wherein such evidence is not corroborated by other evidence.

INSTRUCTION NO. 12

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary.

In the law it is presumed that a witness speaks the

truth and this presumption continues in effect until overcome or outweighed by evidence to the contrary, and unless so outweighed, the jury is bound to find in accordance with the presumption.

INSTRUCTION NO. 13

When you retire to deliberate upon this case, each juror should exercise his individual judgment, so that when a verdict is agreed upon it will constitute the verdict of each individual juror.

In arriving at a verdict, each juror should give due consideration to the views and opinions of the other jurors, and should listen to their arguments with a willingness to be convinced and to yield to their views, if induced to believe them to be correct; but no juror should agree upon a verdict unless he is convinced that the same is correct, and such as his conscience approves, and such as each juror under his oath, after full consideration, believes to be right.

INSTRUCTION NO. 14

Upon retiring to the jury room you will select one of your number to act as foreman. The foreman will preside over your deliberations and be your spokesman in court.

A form of verdict has been prepared for your convenience.

The Court instructs you that under the evidence the plaintiff is entitled to recover the statutory penalty prayed for in the amount of $500.00. You should then determine the amount of actual damages to which you find plaintiff

entitled and insert that amount in paragraph 2 of the form of verdict. You should then determine the amount of punitive damages to which the plaintiff is entitled and insert that amount in paragraph 3 of the form of verdict.

You will take the form to the jury room and when you have reached a unanimous agreement as to your verdict, you will have your foreman fill in, as directed, date and sign the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the court room.

INSTRUCTION NO. 15

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the Court by any means other than a signed writing in a sealed envelope. And bear in mind you are not to reveal to the Court, or to any person, how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

The bailiff will come forward to be sworn.

VERDICT

1. We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, Paul E. Rhodes in the amount of $500.00, the statutory penalty provided for recommitment after discharge from habeas corpus.

2. We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, Paul E. Rhodes, and assess his *actual* damages at $225,000.00.

3. We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, Paul E. Rhodes, and assess *punitive* or

exemplary damages in the amount of $225,000.00.

/s/ Charles Baston
Foreman

April 15, 1964
Date